WES-YAS

No 230

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELMORE L. WESTGATE,
Petitioner,

vs.

FRED G. TIMMER, Receiver of the
DIRECT REFINERY STATIONS,
BERTHA L. WESTGATE,
CLAIRE C. REYNOLDS, and
UNITED STATES OF AMERICA,
Respondents.

PETITION OF ELMORE L. WESTGATE FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

ELMORE L. WESTGATE,
Petitioner.
Business Address:
Box No. PMB 1350,
Terre Haute, Indiana.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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STATUTES CITED

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(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise).

To the Honorable, the Chief Justice of the United States Supreme Court, and the Associate Justices of the Supreme Court of the United States.

Your Petitioner Elmore L. Westgate respectfully prays that this Honorable Court grant his petition for a writ of certiorari to review the judgment of the Supreme Court of Michigan entered in the above entitled cause on June 25, 1943 (1722), affirming a judgment of the Kent Circuit Court of Michigan.

OPINION BELOW

The opinion of the court below is reported in 9 N. W. 2d 661.

JURISDICTION

The jurisdiction of this court is invoked under U.S.C. Title 28, Section 344 (b)., and U. S. Supreme Court Rule No. 38, Section 5 (a).

QUESTIONS PRESENTED

1. Where a wife by a decree of divorce is awarded one-half of the moneys, properties, income and profits in the business of petitioner described as Direct Refinery Stations, is the entire income after such award from such business taxable to petitioner for income tax purposes under the Revenue Act, and are the entire social security taxes or employment taxes as a result of the operation of such business taxable to petitioner and the wife absolved from taxation on her one-half ownership in the business.

2. Where a wife causes a receiver to be appointed over the business and properties of the Direct Refinery Stations, and the United States of America was granted a decree for income and social security taxes in the sum of $142,926.37, with interest to be added thereto, as a result of the operation of such business, is the wife entitled to take one half of the profits and assets out of the receivership prior to payment of the taxes due to the United States of America.

3. Where attorney fees are awarded to the wife, and a decree for a sum of money was also awarded to another party, is payment of such sums of money out of the receivership assets prior to payment of taxes due to the United States of America proper.

4. Was the constitutional rights of petitioner under the 4th, 5th, and 14th Amendment to the United States Constitution violated.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was engaged in the gasoline and oil business. On August 10, 1937, Bertha L. Westgate, above named respondent, commenced divorce proceedings against petitioner, and on November 30, 1938, a decree of divorce was rendered, and Bertha L. Westgate awarded one-half of petitioner's interest in and to all of the properties, moneys, bank accounts and assets of the Direct Refinery Stations as of August 10, 1937, and subsequent thereto (R. 24). After such award made to Bertha L. Westgate, on January 7, 1939, she filed a petition (R. 28), for the appointment of a receiver over the assets and business of the Direct Refinery Stations, and on February 3, 1939, a receiver was appointed (R. 66). Various other parties claimed rights and ownership to assets taken over by the receiver and it was not until January 18, 1941, that it was decreed that such other parties did not own or have any rights in the Direct Refinery Stations (R. 1581, 1582).

The United States of America filed a claim in the receivership matter for income taxes due it amounting to $133,151.94, for the years 1936, 1937, 1938, as a result of the operation of the business described as Direct Refinery Stations, and the assessment for this tax was made April 1939 (R. 569), and after the appointment of the receiver. And the United States of America also filed a claim in the receivership matter for employment or social security taxes due it as a result of the operation of the business, in the sum of $9,774.43, and this tax was assessed March 1939 and January 1940 (R. 566-567), and this assessment was made after the appointment of the receiver, the total claim of the United States of America for taxes due it and allowed by the court amounting to $142,926.37 (R. 1588-1589).

On January 18, 1941, the Kent Circuit Court of Michigan rendered a decree that various other parties who claimed ownership to the properties of the Direct Refinery Stations had no such ownership, and that the Direct Refinery Stations belonged to your petitioner Elmore L. Westgate, and that one-half of such assets shall be paid by the receiver to respondent Bertha L. West-

gate, and the other one-half made subject to the claim of the United States of America (R. 1583-1584).

The court also ordered the receiver to pay respondent Claire C. Reynolds out of the receivership assets the sum of $524.84, although no claim was made by Claire C. Reynolds, and this sum was ordered to be paid prior to payment of the United States of America (R. 1591). And an attorney fee in the sum of $2,500 was ordered to be paid to the attorney for respondent Bertha L. Westgate prior to payment of the claim of the United States of America (R. 1590).

Various books and records were seized by the receiver and others from petitioner without a search warrant and turned over to agents of the United States of America, who examined such books and secured evidence from them and such evidence was used by the United States as a basis for its claim for taxes due it and which was allowed by the court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) Respondent Bertha L. Westgate was made a tenant in common in the business and properties of petitioner Elmore L. Westgate, described as Direct Refinery Stations, as of August 10, 1937, and subsequent thereto, by a decree of the Kent Circuit Court of Michigan, and which decree was affirmed by the Supreme Court of Michigan, and by such decree respondent Bertha L. Westgate was given one-half of the income and profits and assets of such business, therefore Elmore L. Westgate, your petitioner, is not liable under the United States Revenue Act for income and social security taxes as a result of the operation of such business during such period of time on the entire income of such business and for the entire social security tax on the employees, and that respondent Bertha L. Westgate is equally liable for such taxes, and the decision of the court below, and affirmed by the Supreme Court of Michigan, making petitioner Elmore L. Westgate liable for the entire amount of such taxes while

respondent Bertha L. Westgate is absolved from taxation on her one-half interest in the business, is not in accord with the applicable decisions of this court.

(2) If petitioner Elmore L. Westgate is liable for the entire income tax and social security tax, then such tax due to the United States for which a judgment was rendered it in the amount of $142,926.37 (R. 1588-1589), should first be paid by the receiver Fred G. Timmer out of the receivership assets in compliance with the U. S. Revised Statutes, Section 3466, U. S. C. Title 31, Section 191, and that the court below was in error in allowing respondent Bertha L. Westgate to be paid one-half of the receivership assets and profits before payment of any tax due to the United States of America, and that the right of petitioner to have said tax so paid out of the receivership assets was denied to him, and it was error to to do.

(3) The court erred in granting to respondent Claire C. Reynolds a money decree in the sum of $524.84, and in authorizing payment to him out of the receivership assets before payment of the tax due to the United States, and the court erred in awarding an attorney fee to the attorney for respondent Bertha L. Westgate in the sum of $2,500, and authorizing payment out of the receivership assets before payment of the tax due to the United States of America.

(4) Petitioner's constitutional rights under the 4th, 5th, and 14th Amendment to the United States Constitution were violated, and the judgment rendered in favor of the United States in the sum of $142,926.37, was not proper.

PRAYER FOR THE WRIT

Elmore L. Westgate, your petitioner herein, respectfully prays that a writ of certiorari issue to the Supreme Court of Michigan, to the end that the record of this cause be brought to this court, that this cause may be reviewed and determined by this court and that your petitioner may have such other and further relief as the

nature of this case may justify. In support of this, his petition, he tenders a supporting brief hereto annexed.

Respectfully submitted,

(Signed) Elmore L. Westgate,
Petitioner.
Box No. PMB 1350,
Terre Haute, Indiana.

SUMMARY OF ARGUMENT

(1) Bertha L. Westgate was awarded a one-half ownership in the business and profits of the Direct Refinery Stations by a decree and by such award so made petitioner was given a full discharge of his obligation to support Bertha L. Westgate, and the income from such business and property awarded to Bertha L. Westgate was taxable to Bertha L. Westgate and not to petitioner.

(2) Bertha L. Westgate was given no preferred right or claim to one-half of the assets of the Direct Refinery Stations, and before she is entitled to take one-half of the profits and assets out of the receivership the claim of the United States of America for taxes must first be paid in accordance with the statute.

(3) The award made to Claire C. Reynolds, and the attorney for Bertha L. Westgate should not be paid out of the receivership assets prior to payment of the claim of the United States of America for taxes and under the statute the claim of the United States of America must first be paid.

(4) Books and records were seized by the receiver and others without a search warrant and turned over to the U. S. Agents, and they gathered evidence from such books and records and used it as a basis for the claim of the United States for which a judgment was rendered in its favor, and that the attitude or conduct of the U. S. Agents and the manner in which the trial was conducted amounted to a ratification of the wrongful search and seizure by the United States of America and a judgment

based thereon was in violation of petitioner's constitutional rights.

SUPPORTING BRIEF

ARGUMENT

May it please the Court:

(1)

No lien of any kind was granted to respondent Bertha L. Westgate on the assets in receivership. By the decree rendered, respondent Bertha L. Westgate was made a tenant in common with petitioner in the business of the Direct Refinery Stations (R. 22-25, 26-27). *Westgate v. Westgate*, 291 Mich. 18, 25-26. The fact that respondent Bertha L. Westgate was awarded one-half of the profits and assets of the business of the Direct Refinery Stations does not give her any preferred right or claim to have one-half of the assets and profits paid to her before payment of the tax due to the United States of America. In her petition filed (R. 28-37), and upon which petition she caused a receiver to be appointed over the Direct Refinery Stations (R. 66), she makes no claim of any kind by any pleading or even by proper objection on the trial, that she has a lien or preferred claim or right on the assets in receivership and that her claim must first be paid before payment of any tax due to the United States of America. The fact that the decree made designated the award as alimony (R. 24), this did not give to respondent Bertha L. Westgate any lien on the assets in receivership. In order for the award made (R. 24), to be a lien on the property awarded to respondent Bertha L. Westgate by the decree of divorce, the court must so direct by its decree. Compiled Laws of Michigan 1929, Section 12747. And if the court by its decree did direct that the award made was to be a lien on the property and assets of the business of the Direct Refinery Stations, this of itself would not confer any priority to payment over that of taxes due to the United States of America.

In *United States v. State of Texas*, 62 S. Ct. 350, *314*

U. S. 480, decided December 22, 1941, it was held, quoting from the syllabus:

> "A claim of the United States for federal gasoline taxes was entitled to priority, under federal statute regarding priority of claims of the United States, over claim of the State of Texas for motor fuel taxes against assets of insolvent motor fuel distributor, where prior to appointment of receiver for assets of the distributor the State of Texas had made no move to assert lien provided in Texas statute, since the priority which attached to the claim of the United States on appointment of receiver could not be divested by any subsequent proceeding in connection with the state's lien".

Respondent Bertha L. Westgate made no move whatever to assert a lien on the assets in receivership and she was not entitled to priority of payment over that of taxes due to the United States of America. If respondent Bertha L. Westgate did have any lien at all on the assets in receivership it was nothing more than an inchoate lien and it did not have priority over payment of taxes due to the United States of America.

The fact that the decree rendered labeled the award to respondent Bertha L. Westgate as alimony (R. 24), this does not relieve her from payment of taxes upon her share of the business awarded to her. Under the law of Michigan, by the decree rendered, and which decree awarded to Bertha L. Westgate one-half of the assets and profits of the Direct Refinery Stations, this decree rendered gave to petitioner a full discharge from his duty to support his divorced wife Bertha L. Westgate and left no continuing obligation to support, contingent or otherwise. According to the law of Michigan, in *Kutchai v. Kutchai,* 233 Mich 569, on page 575, it is held:

> "Where a gross or lump sum in money or in property is awarded as alimony to the wife, the power of the court is at an end and there then is no power to modify it later".

The continuing obligation to support being discharged by the decree of divorce and alimony awarded, any income or profits resulting from the operation of the business of the Direct Refinery Stations awarded to Bertha L. Westgate is taxable to respondent Bertha L. Westgate, and the entire tax due subsequent to August 10, 1937, is not taxable to petitioner Elmore L. Westgate, and the judgment so rendered (R. 1583, 1584, 1588, 1589), is not in accord with applicable decisions of this court. *Helvering v. Fuller*, 310 U. S. 69, 60 S. Ct. 784. *Pearce v. Commissioner of Internal Revenue*, 315 U. S. 543, 62 S. Ct. 754.

In *Helvering v. Fuller*, supra, the court said:

> "If respondent had not placed the shares of stock in trust but had transferred them outright to his wife as part of the property settlement, there seems to be no doubt that income subsequently accrued and paid thereon would be taxable to the wife, and not to him. Under the present statutory scheme that case would be no different from one where any debtor, voluntary or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like to his creditor in whole or partial payment of his debt. Certainly it could not be claimed that income thereafter accruing from the transferred property must be included in the debtor's income tax return".

(2)

If respondent Bertha L. Westgate is not liable under the Revenue Act for income and social security or employment taxes due to the United States of America upon her one-half ownership of the business and profits resulting from the operation of the business subsequent to August 10, 1937, for the reasons stated in (1), of this brief, then it is the duty of the receiver to pay such taxes due to the United States and for which a judgment was rendered (R. 1588-1589), out of the receivership assets prior to any payment being made to respondent Bertha L. Westgate, and this right to have the tax so paid has

been denied to petitioner. Respondent Bertha L. Westgate is the one that requested the appointment of the receiver (R. 34, 37), and her request was complied with (R. 66). It is not just and equitable for her to cause a receiver to be appointed on February 3, 1939 (R. 66), and then have the receiver operate the business for all of these years and even up to the present time, and then allow respondent Bertha L. Westgate while this income has accrued to take one-half thereof before payment of any tax due to the United States of America.

The United States of America originally filed its claim in the receivership matter on June 21, 1939 (R. 2), and then on May 1, 1940, amended its claim (R. 116). The assessment for income taxes by the United States of America was not made until April 1939 (R. 569), and this assessment was made after the appointment of the receiver, the receiver being appointed on February 3, 1939 (R. 66). The assessment for social security or employment taxes was made in March 1939, and January 1940 (R. 566, 567), and this was after the receiver was appointed. If such taxes due to the United States had been paid prior to the appointment of the receiver, the assets now under the control of the receiver would be that much less in value, and the one-half interest or ownership of respondent Bertha L. Westgate would be that much less in value, or that much less for her to receive. No opportunity whatever was given to petitioner to pay the tax claimed by the United States of America. No claim or demand was made from petitioner prior to the appointment of the receiver. Prior to the receivership petitioner did pay and meet his current obligations (R. 1187). If demand for taxes had been made prior to the appointment of the receiver the taxes due to the United States of America would have been paid. The procedure adopted and attempt made to hinder petitioner in paying the tax due to the United States of America is not just and equitable. It is also not just and equitable for respondent Bertha L. Westgate to cause a receiver to be appointed and have such receiver operate the business for more than four years, and even up to the present time, and accumulate funds and profits from the business and then take one-half of such funds and profits as

well as the assets without payment of taxes due to the United States of America. Such a method of operating a receivership amounts to unjustly enhancing the share of respondent Bertha L. Westgate in the receivership assets, and causes damage and injury to petitioner by creating a situation making it impossible for him to pay the tax due to the United States of America to the profit and advantage of Bertha L. Westgate and her attorney, and to the detriment and injury and damage to petitioner. Such a method of operating a receivership is not just and equitable.

In regard to the liability of respondent Bertha L. Westgate for taxes due to the State of Michigan, the Supreme Court of Michigan in the present case at bar did hold:

> "Under the theory of unjust enrichment it is equitable that any deficiency remaining after the State has exhausted its remedies against Westgate, the Drakes, their sureties, and the receiver, should be charged against Mrs. Westgate's interest. Otherwise Mrs. Westgate's share would be enhanced by moneys collected for, and not remitted to, the State. To this extent the decree must be modified" (R. 1720). *Westgate v. Westgate*, 9 N. W. 2d 661.

U. S. Revised Statutes, Section 3466, U. S. C. Title 31, Section 191, provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed"

In the court below, by documentary evidence received in evidence on the trial of this cause, without any objection whatever by respondent Bertha L. Westgate, or the receiver Fred G. Timmer, it was contended by petitioner, that:

> "It is the claim of the taxpayer (petitioner) herein that the income tax due to the Collector of Internal Revenue for the United States of America, for the Collection District of Michigan, as disclosed by the taxpayer's (petitioner) return herein shall first be deducted out of said income and paid out of the money in the hands of said receiver before Bertha L. Westgate is entitled to share in any funds belonging to the taxpayer (petitioner) herein and in the hands of said receiver, as said claim for the amount disclosed herein has priority over any claim of Bertha L. Westgate. Otherwise, the taxpayer (petitioner) claims the right and reserves the right to deduct such one-half title and interest awarded to said Bertha L. Westgate by virtue of said decree as a proper deduction from said income" (R. 575).

And the United States of America by its claim filed alleged:

> "That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 of Section 659 of the Bankruptcy Act, Section 3466, of the Revised Statutes or other applicable provisions of the law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claim of the United States in accordance with their priority" (R. 117-118).

Respondents Bertha L. Westgate and Fred G. Timmer, the receiver, did not deny that the taxes due to the United States of America must first be paid. They did not contest the right of petitioner to have the taxes due to the United States of America paid first. And although the

receiver by his objections filed reserved the right to respondent Bertha L. Westgate to contest the claim of priority of payment of taxes due to the United States of America (R. 122-123), respondent Bertha L. Westgate, nor the receiver himself, contested the right of taxes due to the United States of America to be first paid. And counsel for respondent Bertha L. Westgate on the trial of this cause even contended:

> "In this particular case income tax and other taxes and claims for them have been filed in this receivership against the principals in this business and against the business, as I understand it, and these individuals went down to Washington to see whether some adjustment could not be made on those taxes that had been levied, and these statements were voluntary statements made by these individuals in connection with the business for the purpose of in some way or other arriving at some adjustment with respect to the taxes and it is the position of the plaintiff (respondent Bertha L. Westgate) that statements that the principals have made under these circumstances in connection with the business they are conducting are binding upon themselves and the other principals" (R. 938).

Respondent Bertha L. Westgate made no claim that she was entitled to priority of payment out of the receivership assets and did not even join issue on this question of priority. Under the statute cited, the taxes due to the United States of America have priority and must first be paid out of the receivership assets. *United States v. Texas*, supra. The right of petitioner to have his tax due to the United States of America first paid out of the receivership assets has been denied to him, and to his injury and damage.

The amount due to the United States of America for taxes, not including interest, amounts to $142,926.37 (R. 1588-1589). As of December 31, 1939, the assets in the hands of the receiver and which assets also include the profits made by the receiver as a result of the operation of the business for the year 1939 amount to $68,000.00

(R. 1183). In addition to this sum there are other assets which are not in the hands of the receiver, but belong to the receivership, and which consist of money in the banks in the sum of $19,000.00, and station inventory of $15,000.00 (R. 1185). The assessment for taxes was not made by the United States until after the appointment of the receiver. If the assessment had been made before a receiver was appointed and an opportunity given to petitioner to pay the tax, upon payment of the tax there would have been just that much less for respondent Bertha L. Westgate to receive. If the United States of America had proceeded in the usual manner for the collection of its tax, U. S. C. Title 26, Section 272, there would have been just that much less for respondent Bertha L. Westgate to receive out of the assets now in receivership. Petitioner should not be penalized because of the delay in making a claim for the tax, and respondent Bertha L. Westgate be permitted to profit by this delay. Here we have a business built up and that is a going business and a business that met and paid its obligations up to the time of the appointment of a receiver (R. 55, 1187). It does not seem equitable and just to attempt to destroy this business in the manner attempted (R. 55-57). Petitioner Elmore L. Westgate has an equal right with that of Bertha L. Westgate in the assets of this receivership. Payment to Bertha L. Westgate of one-half of these assets without first paying the tax due to the United States of America out of the receivership assets will require sale of the properties and equipment used in this business of the Direct Refinery Stations and the purpose sought to be accomplished carried out (R. 55-57). If the tax is paid in accordance with the statute before payment to Bertha L. Westgate and her attorney a destruction and ruination of the business can be avoided, and petitioner should be accorded this right under the statute to have the tax due to the United States of America first paid before payment of assets are made to Bertha L. Westgate and thus prevent a destruction and ruination of the business. Receiverships created for conservation and preservation of assets should not be per-

mitted to ripen into a destruction and ruination of the business. This receivership was created for:

> "Conservation of said business and protection of the rights of all parties in interest" (R. 67).

For the year 1936, from the operation of this business, according to the testimony of the Government's own witness, a taxable income of $23,949.88 was earned (R. 1116); for the year 1937 the business earned a taxable income of $69,223.42 (R. 1126); and for the year 1938 the business earned a taxable income of $137,170.21 (R. 1130). It was for this taxable income earned by the business for which the claim of the United States of America was made and for which a judgment was rendered, and one-half of this business was owned by respondent Bertha L. Westgate. Although the receiver was appointed on February 3, 1939 (R. 66), and the receiver took over and began operating the business, yet for the year ending 1939, while the business has been under the operation of the receiver only the sum of $5000 was earned by the business as a result of the receiver's operation of the business (R. 1183). The charges made that an attempt is being made to ruin petitioner and his business (R. 55-57) are not imaginary or fantastic. We must assume that the testimony of the Government's witnesses are true as to the income earned by this business and for which a tax was assessed and allowed. Yet although the receiver took over the business at the peak of its earning power a very small income was earned as compared to the testimony of the Government's witnesses for income earned by the business just prior to the appointment of the receiver. Petitioner should be accorded the right to have the tax due to the United States of America first paid out of the receivership assets before Bertha L. Westgate, her attorney and Claire C. Reynolds are permitted to share in any of the assets. Such right accorded petitioner will enable him to pay the tax and prevent a ruination and destruction of the business.

(3)

No claim was made by Claire C. Reynolds yet a money decree is granted to him (R. 1591), and this is to be paid

out of the receivership assets before payment of taxes due to the United States of America. And it was even conceded by Mr. Reynolds' attorney that payment to Reynolds out of the receivership assets for money paid by Reynolds on petitioner's income tax was not proper. The record shows:

> "Mr. Miller: * * * I think the second $400.00 was paid out of Reynolds' own funds and Reynolds will have to file a claim for refund for that to get it back. I think Mr. Bryant has agreed with me that that is the proper situation.
>
> Mr. Bryant: Yes, I agree to that" (R. 1139).

And even although Reynolds was employed by the business prior to the receivership at a salary of $15 per week, yet he is immediately employed by the receiver and at a salary of $50.00 a week (R. 283). Petitioner has a right to see that his assets in receivership are not dissipated so that he is prevented from having his tax due to the United States of America paid out of the receivership assets. And the plan put in operation to put petitioner out of business (R. 55-57) should not be permitted to be carried out.

The attorney fees awarded to the attorney for respondent Bertha L. Westgate was given precedence as an expense of the receivership (R. 1590). Although proceedings were taken in the Supreme Court of Michigan, *Westgate v. Westgate*, 294 Mich. 88, resulting in the reversal of a decree authorizing payment of attorney fees to the attorney for respondent Bertha L. Westgate, yet such attorney fees decreed to be improper, and ordered to be returned back to the receivership assets, the order was not complied with and the attorney fees retained (R. 1575).

Mr. Laurence W. Smith, was the attorney appointed for the receiver, and Mr. Dunn was not the attorney appointed for the receiver. Mr. Smith, as attorney for the receiver was allowed a monthly compensation of $200.00 a month (R. 78-79), and in addition thereto a lump sum of $500.00 (R. 79), and $700.00 (R. 82). Mr. Dunn repre-

sented respondent Bertha L. Westgate, a party to the suit, and who was opposing petitioner, and by reason of his position in the case he could not properly render services in behalf of the receiver, and the payment of money to Mr. Dunn as attorney fees under the guise of an expense of the receivership and authorizing payment prior to payment of the tax due to the United States of America was not proper.

In *Vieth v. Ress*, 82 N. W. 116, 60 Neb. 52, where a receiver was appointed, and one of the attorneys for the plaintiff was appointed as attorney for the receiver, and awarded $100.00 for services rendered, the court said:

> "We think the court erred in appointing Mr. Pettis to act for the receiver, over the protests of creditors. The interests of the debtor and creditor are conflicting, and the same attorney cannot with propriety act for the receiver. * * * We think the law upon this subject is correctly stated by Beach in his work on the Law of Receivers (Alderson's Edition, 1897). At page 274 the learned author says:
>
> " 'The same reasons which suffice to render the legal advisor of one of the parties to an action inelligible to be appointed receiver operate, also, to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his cliant, will, in most cases, if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties, such as cannot be properly performed by one person.' ".

See also *Adams v. Woods*, 8 Cal. 306.
Old Colony Trust Co. v. Union Land & Cattle Company, 4 Fed (2) 449.

And the Supreme Court of Michigan, in *Merchant's and Manufacturers' National Bank of Detroit v. Kent Circuit Judge*, 43 Mich. on page 297, held:

> "The practice in equity does not even permit the receiver to employ a solicitor in the case as his own

counsel, lest it might disarm his vigilance in watching the receiver's proceedings".

And in speaking of the administration of justice, in *State v. Neville*, 288 N. W. on page 84, in a per curiam opinion, it is said:

> "So far as the average citizen is concerned, he is less in touch with the executive and legislative department. When he is confronted with private or public differences, he naturally turns to the court for relief. His faith in the courts must be encouraged. When the time comes that our people lose faith in the courts, our form of government is fast nearing its end. * * * That faith can only be sustained by keeping our judicial proceedings, not only free from wrong, but free from all suspicion of wrong. In other words, all our court proceedings should be like Caesar's wife, 'above suspicion' ".

The receiver appointed by the court is an arm of the court. He is presumed to be neutral. Employment by him of one of the attorneys representing one of the litigants and payment to such attorney fees out of the receivership under the guise of receivership expenses prior to payment of taxes due to the United States of America is not proper.

(4)

It is the contention of petitioner that the United States of America consolidated its action with that of respondents Bertha L. Westgate and Fred G. Timmer, the receiver, and acquiesced in the procedure adopted, and that the manner or method adopted by the United States of America in the prosecution of its claim amounted to a ratification of the wrongful search and seizure of petitioner's books and records and property by Fred G. Timmer, and others, contrary to the 4th and 5th Amendment of the United States Constitution, and that the evidence thus secured was the basis of the decree rendered in favor of the United States, and that a judgment or decree rendered upon evidence so secured constitutes a de-

nial of due process under the 14th Amendment to the United States Constitution. In substantiation of these claims petitioner will point out to the court where such rights were violated by reference to the record.

Respondent Fred G. Timmer, and others, on February 4, 1939, went to 222 Pine Street, Mt. Pleasant, Michigan, where the business of petitioner was conducted. Russell Westgate, a son of petitioner was in charge of the place and he was forcibly put out of control of the business and place. Articles were removed and among the articles was a safe and a party was hired to open up the safe and its contents were removed (R. 402). This place where the business of petitioner was being conducted was a dwelling house (R. 596, 915, 916, 920). The receiver after the seizure of these books and records cooperated with the United States Agents. The United States Agents had no difficulty in examining the books and records wrongfully seized. They spent several days in looking them over and obtaining evidence therefrom (R. 1111-1112). The United States Agents even took the books and records and had them in their possession for several days and made an audit of them (R. 609). After the books were seized and removed from petitioner's place of business entries were made in them while they were kept out of possession of petitioner. Over one hundred entries had been made in the books and they were tampered with (R. 510, 598, 607). While others freely had the use of the books and records (R. 607, 609), this privilege was denied to petitioner (R. 608, 609). These books and records seized from petitioner were used by the United States Government on the trial of this cause as a basis for their claim and were put in evidence by the United States Government (R. 591, 594, 631, 632). And the decree rendered in favor of the United States of America including fraud penalties was based upon such evidence wrongfully obtained (R. 1127-1128, 1134-1135). On the trial of this cause the United States Government acquiesced in others, not Government attorneys or agents of the Government, in participating in the trial of the United States. Mr. Dunn, Mr. Smith, and Mr. Bryant were not representatives of the United States Govern-

ment (R. 558-559). This assistance given to the United States by the attorney for respondent Bertha L. Westgate, and the attorney for the receiver, was objected to (R. 589, 599, 614, 615, 627, 742, 758, 760, 783, 784). And what proof the United States Government could not put in, aid and assistance was given by the respondent Fred G. Timmer, the receiver, over the objection of petitioner (R. 725, 728, 729, 749, 750). And the receiver made no attempt whatever to defend the claim filed (R. 1203), but on the other hand assisted the United States in provits claim (R. 750, 784, 883, 894). And the United States did not undertake to grant to petitioner a fair trial by preventing such interference by others, but on the other hand acquiesced in this interference indulged in (R. 589, 590). Under the guise of cross examination by others, leading questions were propounded that the Government could not ask on direct examination (R. 601, 614, 627, 653, 759, 760, 768, 783, 784, 795, 799, 812, 813, 818, 907, 915, 1137, 1138, 1180). And income tax returns and social security tax returns (R. 571-575, 579), that are privileged between the Government and the taxpayer, such privilege was fritted away and others allowed to inspect them and obtain information from them (R. 581, 590), by the procedure adopted and acquiesced in by the United States Government on the trial of this cause.

The wrongful seizure of the books and records of petitioner was made the basis for evidence used by the United States Government in establishing its claim for which a decree was rendered in its favor. The acts and conduct of the United States Agents, and the manner in which aid and assistance was given to the United States in establishing its claim for which a decree was rendered in its favor, amounted to a ratification by the United States Government of this wrongful seizure and search of petitioner's books and records, and was a violation of petitioner's constitutional rights under the 4th and 5th Amendment to the United States Constitution. *Gambino v. United States,* 48 S. Ct. 137, 275 U. S. 310.

A judgment based upon evidence obtained in violation of one's constitutional rights is erroneous. *Gambino v. United States,* supra.

And evidence thus obtained amounts to a denial of due process of law under the 14th Amendment to the United States Constitution. *Brown v. State of Mississippi,* 297 U. S. 278, 56 S. Ct. 461. *Chambers v. State of Florida,* 309 U. S. 227, 60 S. Ct. 472. *White v. State of Texas,* 310 U. S. 530, 60 S. Ct. 1032. *Ward v. State of Texas,* 316 U. S. 547, 62 S. Ct. 1139.

CONCLUSION

It is respectfully submitted that petitioner should not be made liable for the entire amount of income and social security taxes claimed by the United States of America and that respondent Bertha L. Westgate should be made liable for her share of such taxes by reason of her one-half ownership in the business of the Direct Refinery Stations. That in any event, the taxes due to the United States of America should first be paid out of the receivership assets before respondents Bertha L. Westgate and her attorney, and Claire C. Reynolds are permitted to take any of such assets out of the receivership. That the trial had fixing liability and the amount of the tax due to the United States of America was not proper due to the interference of others than Government Agents and Attorneys, and that evidence was introduced on such trial in violation of petitioner's constitutional rights, and that he was denied due process of law, and that the judgment rendered in favor of the United States of America should be reversed and a new trial granted to petitioner without the interference by others.

Respectfully submitted,

(Signed)

ELMORE L. WESTGATE,
Petitioner.
Box No. PMB 1350,
Terre Haute, Indiana.